

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
WHITE ARROW SERVICE STATIONS, INC.	:	DETERMINATION
for Revision of a Determination or for Refund	:	
of Motor Fuel Tax under Article 12-A of the	:	
Tax Law for the Year 1987.	:	

Petitioner, White Arrow Service Stations, Inc., 85 Rowley Hollow Road, Cheektowaga, New York 14227, filed a petition for revision of a determination or for refund of motor fuel tax under Article 12-A of the Tax Law for the year 1987 (File No. 806940).

A hearing was commenced before Arthur S. Bray, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on March 27, 1990 at 1:45 P.M. and concluded at the same offices on July 30, 1990 at 1:30 P.M., with all briefs to be filed by October 19, 1990. Petitioner appeared by Borenkind & Mondschein (Morris A. Mondschein, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Gary Palmer, Esq., of counsel).

ISSUE

Whether the Division of Taxation properly imposed a penalty for late filing of a diesel motor fuel tax return.

FINDINGS OF FACT

Petitioner, White Arrow Service Stations, Inc., filed a Return of Tax on Diesel Motor Fuel for the month of October 1987. The return was signed by Philip Hasselback as vice-president and dated November 20, 1987. It bore a Division of Taxation receipt stamp date of November 30, 1987. The return was accompanied by a check, dated November 20, 1987, payable to the New York State Tax Commission. The check was drawn in the amount of \$47,343.70, the tax shown due on the accompanying motor fuel tax return. The earliest date

stamped on the back of the check is November 30, 1987 from Norstar Bank of Upstate New York. The check is imprinted with a stamp from another bank dated December 1, 1987.

The envelope which was used to mail the return bears an illegible marking. A legible postmark, dated November 27, 1987, Buffalo, NY, is located next to the illegible marking.

The Division of Taxation issued a Notice and Demand for Payment of Tax Due Under Diesel Tax Law, dated February 4, 1988, to petitioner, White Arrow Service Stations, Inc. The notice assessed penalty of \$4,734.37, plus interest of \$70.09, for a total amount due of \$4,804.06. The notice, which was issued because of petitioner's late filing of a tax return, explained that petitioner's diesel tax return for the period October 1987 was received on November 30, 1987.

Petitioner's motor fuel tax returns were prepared by its vice- president, Philip Hasselback. It was Mr. Hasselback's practice to place the date on the return and, on the same day, take the return to the Post Office on William Street in Buffalo, New York. Mr. Hasselback made a point of getting the return to the Post Office before 10:30 P.M. on the last day permitted for filing because if he was not there by that time the return might be dated the next day.

At the hearing, Mr. Hasselback testified that he personally took the return for the period October 1987 to the main Post Office in Buffalo before 10:30 P.M. on November 20, 1987.

Petitioner presented a series of cancelled checks in order to establish that a substantial period of time elapses between when a check is received by the Division and when it is presented to petitioner's bank according to the stamp on the back of the check. These checks, which accompanied timely returns, disclose the following:

Date of <u>Check</u>	Date Check Presented to Petitioner's Bank
December 19, 1988	January 11, 1989
February 20, 1989	March 7, 1989
March 20, 1989	April 5, 1989
March 20, 1989	April 10, 1989
March 20, 1989	April 10, 1989
April 20, 1989	May 2, 1989
September 18, 1989	October 3, 1989

Petitioner's check register statements and cancelled checks are no longer available

because Mr. Hasselback's basement was flooded and the individuals who cleaned up inadvertently threw the items out. Petitioner has the cancelled check relating to the return in issue because, when he was told there was a problem with the return, the check was set aside.

On November 20, 1987, the date the check for the October 1987 motor fuel tax was drafted, petitioner's bank balance was sufficient to satisfy the outstanding liability for motor fuel tax.

Other than the current matter, there has only been one other instance where New York State asserted that a return from petitioner was not timely filed. That incident occurred more than five years ago and ultimately resulted in the conclusion that no penalty would be assessed.

The United States Postal Service has no way of affirming or denying that petitioner's envelope was deposited on November 20, 1987.

Petitioner was given a period of time after the hearing to ask the United States Postal Service to interpret the markings on the face of the envelope. In a letter dated July 13, 1990, the following explanation was provided:

"It appears this letter required additional processing because the 17-cent stamp, when applied, covered the preprinted Facing Identification Mark (FIM). The addressee preprinted this FIM along with a barcode representing their ZIP+4 to allow the Postal Service to identify and separate this mail for direct processing on bar code sorters.

Because the FIM was covered by your stamp, it was directed to our automation operation where a barcode was sprayed over the preprinted barcode.

It is my opinion that when it arrived at the Albany Mail Processing Center, the bar code could not be clearly read and had to be sorted through mechanized equipment, where the mail is read by a human being who keys in the ZIP Code from the mail.

While I cannot give you exact timeframes for the processing of this particular piece of mail, I hope this information will be helpful to you."

SUMMARY OF THE PARTIES' POSITIONS

It is petitioner's position that the testimony and documents establish that the tax return was timely mailed. Specifically, petitioner contends that the illegible marking is a postmark. Petitioner's argument continues that in view of the Postal Service's admitted processing delay and Mr. Hasselback's testimony, petitioner has satisfied its burden of proving that the return was

timely filed. Petitioner submits that it is conceivable that the envelope was returned to the Buffalo Post Office from Albany when it could not be properly sorted, restamped and returned to Albany. Petitioner also notes that the check for the October 1987 return was processed in the same time frame as previously mailed timely filed returns and checks. Therefore, New York State has not suffered any injury from any delay that might have occurred. Petitioner submits that under these circumstances, penalty should be waived.

It is the Division's position that the legible postmark establishes that the return in question was mailed on November 27, 1987, and therefore was filed late.

CONCLUSIONS OF LAW

A. Motor fuel tax returns for a particular month are to be filed on or before the 20th day of the succeeding month (Tax Law § 287[1]). A distributor or other person who fails to file a return within the time prescribed is subject to a penalty (Tax Law § 289-b[1][a]).

B. Tax Law § 289-d(1) sets forth rules governing the mailing of documents and provides, in part, as follows:

"Except as otherwise provided in this subdivision, if any return, claim, statement, notice, application or other document required to be filed, or any payment required to be made, within a prescribed period or on or before a prescribed date under authority of any provision of this article is, after such period or such date, delivered by United States mail to the tax commission, bureau, office, officer or person with which or with whom such document is required to be filed, or to which or to whom such payment is required to be made, the date of the United States postmark stamped on the envelope shall be deemed to be the date of delivery. This subdivision shall apply only if the postmark date falls within the prescribed period or on or before the prescribed date for the filing of such document, or for making the payment, including any extension granted for such filing or payment, and only if such document or payment was deposited in the mail, postage prepaid, properly addressed to the tax commission, bureau, office, officer or person with which or with whom the document is required to be filed or to which or to whom such payment is required to be made."

C. The regulations promulgated pursuant to Tax Law § 289-d explain that when a return or payment of tax is mailed in accordance with 20 NYCRR 419.3 on or before a prescribed date, the return or payment (if not later dishonored) will be deemed timely filed and timely made (20 NYCRR 413.3[a]).

D. The postmark of the United States Postal Service is of particular significance. In

general, if a return is delivered by the United States Postal Service after a prescribed date, the date of the United States postmark stamped on the envelope containing the return will be deemed the date of filing (20 NYCRR 419.3[a][1]). This rule is further qualified by 20 NYCRR 419.3(a)(2)(iii)(a) which provides as follows:

"If the postmark on the envelope or wrapper containing the document or payment is made by the United States Postal Service, such postmark must bear a date stamped by the United States Postal Service which is within the prescribed period or on or before the prescribed date for filing or paying. If the postmark stamped by the United States Postal Service on the envelope or wrapper does not bear a date which falls within such prescribed period or on or before such prescribed date for filing or paying, the document or payment will not be considered to be timely filed or paid, regardless of when the envelope or wrapper was deposited in the mail. Accordingly, the sender assumes the risk that the envelope or wrapper will bear a postmark date stamped by the United States Postal Service within the prescribed period or on or before the prescribed date for filing or paying (see subdivision [b] of this section with respect to the use of registered mail or certified mail to avoid this risk). Furthermore, if the postmark made by the United States Postal Service on the envelope or wrapper containing the document or payment is not legible, the provisions of clause (c) of this subparagraph shall apply, unless the person who or which is required to file or pay can prove when the postmark was impressed by the United States Postal Service."¹

E. This regulation governs the crux of this matter. As noted, petitioner contends that the envelope which contained the return was

postmarked a second time because the original postmark was illegible. If petitioner's interpretation of the markings on the envelope were correct, then testimony or other evidence

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20 NYCRR 419.3(a)(2)(iii)(c) provides:

"If the envelope or wrapper containing the document or payment bears sufficient prepaid United States postage but is missing any postmark whatsoever, the document or payment must be received by the Department of Taxation and Finance not later than the time when an envelope or wrapper which has sufficient postage prepaid and is properly addressed, mailed and sent by the same class of mail would ordinarily be received at the address designated by the department if it were postmarked at the same point of origin by the United States Postal Service on the last day of such prescribed period or on the prescribed date for filing or paying. In a case where the document or payment is received after such time, the provisions of clause (b)(2) of this subparagraph shall apply."

might be used to establish the date of the illegible postmark (see, e.g., Mason v. Commr., 68 TC 354 [1977]; Novak v. Commr., 36 TCM 1169 [1977] [which permit such evidence when a similar Federal regulation is involved]).

The problem presented here is that it is not possible to conclude that the illegible markings are an original postmark. In this regard, it is noteworthy that the letter from the United States Postal Service (Finding of Fact "11") merely states that a barcode was sprayed over the preprinted barcode. The letter does not state that the envelope was postmarked a second time. Thus, petitioner's argument to this effect is rejected as unsupported conjecture.

Here, petitioner's vice-president explained that he chose to mail the return by regular U.S. mail on the evening of the last day for filing. By following this practice, petitioner assumed "the risk that the envelope or wrapper will bear a postmark date stamped by the United States Postal Service within the prescribed period or on or before the prescribed date for filing or paying..." (20 NYCRR 419.3[a][2][iii][a]). Accordingly, since the one postmark on the envelope is not before the prescribed date for filing, the return may not be considered timely filed regardless of when the envelope was deposited in the mail (20 NYCRR 419.3[a][2][iii][a]).

It is noted that if petitioner does not wish to assume the risk that the return will not have a timely postmark, it may use either certified or registered mail (20 NYCRR 419.3[b][1], [2]).

F. Petitioner's argument that the delay was due to reasonable cause is without merit. The time span involved in the Division's processing of a check does not establish reasonable cause for a taxpayer's failure to timely file a return.

G. The petition of White Arrow Service Station, Inc. is denied and the Notice and Demand for Payment of Tax Due under Diesel Tax Law, dated February 4, 1988, is sustained.

DATED: Troy, New York

6/27/91
